



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4B

BRAZIL

This is the **summative (formal) assessment** for **Module 4B** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 4B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment4B]**. An example would be something along the following lines: 202122-336.assessment4B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1 [1 mark]

Indicate the **correct answer** regarding bankruptcy legislation in Brazil:

- (a) The Bankruptcy Law regulates the liquidation – but not the reorganisation – of any individual or legal entity with activities in Brazil.
- (b) The former Civil Procedure Code regulates the reorganisation of non-business individuals and legal entities.
- (c) The current Bankruptcy Law contains a section addressing cross-border bankruptcies.**
- (d) The Bankruptcy Law does not allow companies belonging to the same economic group to file for restructuring jointly.

Question 1.2 [1 mark]

Which of the following statements is **correct** with regards to the Brazilian judiciary?

- (a) Brazil has a single apex court: the Superior Court of Justice, which is in charge of constitutional issues.
- (b) Labour disputes take place at a specialised segment of the judiciary, composed of labour courts, courts of appeal and a superior court.**
- (c) Insolvency proceedings take place at the federal-level judiciary (as opposed to the state-level judiciary).
- (d) The nomination of an individual as a judge of a bankruptcy court is the result of an election by popular vote from residents within that particular judicial district.

Question 1.3 [1 mark]

Select the **false statement** concerning security rights within the Brazilian legal system:

- (a) A pledge is a lien that may be constituted over both movable and immovable assets.**

- (b) Despite being a lien over immovable property, mortgages may also be used to offer aircrafts and vessels as security.
- (c) The *antichresis* is a rarely used type of security, the purpose of which is to assign the income from an immovable property to the guaranteed party.
- (d) Fiduciary titles are increasingly used as a security due to the fact that this guarantee allows for the guaranteed party to take possession of the collateral and sell it outside a bankruptcy proceeding, as long as certain conditions are met.

Question 1.4 [1 mark]

Which of these parties **is allowed** to file for a judicial recovery case under the terms of the Bankruptcy Law?

- (a) A *sociedade de economia mista* (a company whose majority equity interest belongs to the Federal, State or local government).
- (b) An accounting firm.
- (c) An individual who carries on a business activity without the use of a legal entity.
- (d) An insurance company.

Question 1.5 [1 mark]

Concerning corporate liquidation, indicate the **incorrect** statement below:

- (a) The Bankruptcy Law provides the means for the debtor to file a voluntary liquidation proceeding.
- (b) None of the gateways for the involuntary liquidation of a debtor require the creditor to actually prove the balance sheet insolvency of the debtor.
- (c) A debtor has a 10-day period, after service of process, to present his defence against a creditor seeking its liquidation.
- (d) A decision from the bankruptcy court declaring the bankruptcy of a debtor is unappealable.

Question 1.6 [zero]

Which of the following claims has the **highest priority** under a bankruptcy proceeding?

- (a) Fees payable to the judicial administrator and its auxiliaries.
- (b) Tax-related fines.
- (c) Administrative expenses of the estate. [a and c were accepted as correct]

(d) Unsecured claims.

Question 1.7 [1 mark]

A debtor under judicial recovery has the following creditors:

- 50 creditors in Class I (workers and labour-related claims)
- 3 creditors in Class II (creditors secured by *in rem* guarantees)
- 300 creditors in Class III (unsecured creditors)
- 200 creditors in class IV (claims held by micro and small enterprises)

The total amount of debt owing in each class is the following:

- BRL 1 million in Class I
- BRL 5 million in Class II
- BRL 50 million in class III
- BRL 30 million in Class IV

Assuming all creditors are present at the debtor's general meeting of creditors, **indicate the only true statement** regarding the approval of the plan:

- (a) The approval of the plan in Class I is solely dependent on its approval by creditors whose claims amount to a quantity in excess of BRL 0.5 million.
- (b) The approval of the plan in Class II is solely dependent on a majority by head count.
- (c) The approval of the plan in Class III depends on a double majority: by head count and by the total amount of claims.
- (d) The approval of the plan in Class IV is solely dependent on favourable votes by creditors whose claims exceed BRL 15 million.

Question 1.8 [1 mark]

Which of the following documents **needs to be** presented by the debtor at the moment of filing for judicial recovery?

- (a) A full nominal list of creditors.
- (b) Accounting statements for the last financial year for the current administrators of the company.
- (c) A judicial recovery plan.
- (d) A list with a brief description of the contracts entered into by the debtor in the last financial year.

Question 1.9 [zero]

Indicate the **only correct statement** below relating to the cramdown of a judicial recovery plan:

- (a) “Cramdown” is a doctrine that allows for creditors to present their own alternative reorganisation plan.
- (b) There are no statutory provisions on cramdown under the current Bankruptcy Law, it is a judicially-created doctrine.
- (c) Among the criteria that must be met for a cramdown to be imposed, the plan needs to receive favourable votes from over half the total amount of claims in each of the classes of creditors that were present at the general meeting.
- (d) A cramdown cannot be imposed if the judicial recovery plan entails the discriminatory treatment of creditors within the class that rejected it at the general meeting of creditors.
[correct answer]

Question 1.10 [1 mark]

Select the **correct statement** from the options below regarding extrajudicial recoveries:

- (a) Extrajudicial recoveries allow for a larger set of debtors to seek their reorganisation in comparison to the set of debtors that are allowed to file for judicial recovery.
- (b) Extrajudicial recoveries do not allow the debtor to restructure labour claims.
- (c) Extrajudicial recoveries represent a consensual solution to a financial crisis, as extrajudicial plans may not be imposed on dissenting creditors.
- (d) Extrajudicial recoveries do not allow the debtor to dispose of its assets free of any encumbrances, unlike judicial recoveries.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] [2 marks]

Cite **two (2) faulty actions** that could lead to the debtor’s administration being removed during a judicial recovery case.

The concept of debtor in possessions which is adopted by the Bankruptcy Law means that the debtor is permitted to management the business during judicial recovery. Article 64 of the Bankruptcy Law sets out the circumstances under which a debtor’s administration might be removed during a judicial administration process and include for example, where the debtors or its managers have been sentenced finally and conclusively for a crime that they committed under previous judicial recovery or bankruptcy or a crime against property, public welfare or economic order or where there are strong signs of the debtor or managers having committed such a crime.

Question 2.2 [maximum 3 marks] [3 marks]

State the **three (3) manners or ways** by which the assets of the bankrupt estate may be sold by the judicial administrator during a liquidation procedure.

During a liquidation procedure, the assets of the bankrupt estate may be sold in one of the three following ways:

1. Electronic, in-person or hybrid auction;
2. A competitive procedure promoted by a specialised agent;
3. Any other means that is approved under the terms of the Bankruptcy Law.

Question 2.3 [maximum 2 marks] [0.5 mark]

State **two (2) acts** that may be rendered ineffective towards the bankrupt estate if carried out whilst the “suspect period” of a bankruptcy proceeding was in effect.

The bankruptcy decree imposes what is referred to as the ‘suspect period’ which is a time period of less than **[not more than]** 90 days from the filing of the petition requesting bankruptcy or a creditor’s protest (a notice by the creditor which publicises the fact that the debtor has failed to pay a certain debt.) Given that the primary aim of the bankruptcy is maintain the status quo as regards the assets and liabilities of the bankrupt, a bankruptcy decree triggers a stop to a debtor’s ability to manage or dispose of its assets or otherwise engage in any business activities. Accordingly, certain acts which could lower the value of the assets available to creditors are prohibited. For example, **[why for example if we are not dealing with facts that occur after the bankruptcy decree?]** debtors cannot pay any debtors within the suspect period which have not fallen due or the payment of any debts have become due in a way which does not comport with the terms of the contract to which that debt is subject. **[nothing else?]**

Question 2.4 [maximum 3 marks] [2.5 marks]

Identify **three (3) changes** introduced to the Brazilian insolvency legal system due to the enactment of Federal Law 14.112/2020.

The enactment of Federal Law 14.112/2020 on 23 January 2021 represented the first major reformation to the Brazilian Recovery and Bankruptcy Law, Federal Law No. 11.101/2005 (the “Bankruptcy Law”). Federal Law 14.112/2020 introduced several important provisions to the Bankruptcy Law aimed primarily at promoting efficiency within the Brazilian law regime, affecting the procedures within judicial recovery, extrajudicial recovery and bankruptcy.

Judicial Recovery Plans

Creditors are heavily involved in the carrying out of the insolvency procedure. The enactment of Federal Law 14.112/2020 has expanded the role of creditor to include the ability to put forward an alternative recovery plan if the plan that is presented by the debtor is rejected by them. This therefore removes the inefficiencies resulting from the need to repeat the process of presenting a new recovery plan with a risk that the creditors will once again reject it. This issue is made worse by the fact that the debtor maintains exclusive jurisdiction for putting the judicial recovery plans forward. **[not clear what you mean in the last sentence]**

Tax Claims

With respect to tax claims, Article 7-A of the Bankruptcy Law provides tax authorities with a mechanism through which their claims can be presented against a debtor. Notification of definitive claims that are recognised by a competent tax court will be given to the bankruptcy court and the

amount of that claim will be included in the list of creditors. Tax claims that are not yet settled by the competent tax court will continue to be adjudicated as normal until a determination is made by the relevant court.

Groups of Creditors

Prior to the enactment of Federal Law 14.112/2020, there was confusion as to the procedural steps that ought to be taken by debtors who formed part of the same group. Once a group of creditors meet the single condition that they are under common control, they can file for judicial recovery jointly before one court and following a single procedure. Procedural consolidation also consolidates (or substantially consolidates) the assets and liabilities of each member of the group of debtors which in turn, allows for easier management of the judicial recovery process. The one caveat to the consolidation of assets and liabilities is that there must be evidence of previous comingling of assets. Two of four scenarios must be present, the existence of cross-guarantees, control over the debtor being dependent on the ongoing business of another debtor, complete or partial identity of the partners within the group and joint action in the market.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks] [4 marks]

How is the judicial recovery for micro and small enterprises different from a regular judicial recovery?

The definition of a micro and small enterprise in accordance with the Brazilian Constitution and Complementary Law 123/2006 are operations that either have a gross revenue of less than BRL 360K per annum (micro enterprise) or a gross revenue of between 360K and BRL 4,800,000 per annum (small enterprises). Although the special regime and procedure designed for micro enterprises and small enterprises are not mandatory, the regime does provide an alternative to the regular judicial recovery process.

One manner in which the special regime distinguishes itself from the regular judicial process relates to the level of restriction as regards to the recovery plan. For example, the recovery plan restricts the number of instalment payments to 36 months and requires that the amounts payable for each month is the same. Those amounts are subject to a restatement which includes the interest rate by reference to the Special Settlement and Custody System. Claims are also made subject to haircuts. Debtors who are subject to a judicial plan and wish to increase expenses or hire employees are required to obtain authorisation by the judge to do so. Despite these restrictions, the absence of a judicial administrator is one of the main attractive features since it reduces the overall expense of the judicial process.

The judicial process for micro and small enterprises also distinguishes itself from a regular judicial process by reference to the way certain decisions are made. Creditors who hold more than 50% of the claims in each class have the ability to convert the judicial recovery to a bankruptcy by rejecting a judicial plan (without the need for a general meeting of creditors). Those creditors also have the ability to approve a judicial recovery plan ensuring the grant of judicial recovery.

[which claims are subject to the recovery of small and micro business? Any grace period?]

Question 3.2 [maximum 5 marks] [4 marks]

What is a “claim for restitution” under a bankruptcy procedure? How does it work?

Restitution generally, is a legal remedy aimed at restoring to an innocent party any gains that another party has wrongfully obtained. Within the context the Bankruptcy Law, a claim for restitution is a mechanism through which assets or funds in the possession of the estate can be reclaimed and returned to certain categories of parties entitled to make such claims under the Law. As to the question of who is entitled to a claim for restitution, the answer is generally, third parties.

The matter in which a third party will receive restitution is dictated by the type of asset and whether that asset exists at the time that the claim for restitution is made. If an asset is sold on credit and delivered to the debtor in the 15 day. Before the presentation of a petition for bankruptcy and that asset has not been sold, the asset will be returned to the seller.

There are certain rules as regards restitution of assets in cash. If the asset is no longer in existence at the time that the claim for restitution is made or if the asset has been sold, the appraised value or price that it was sold for will be used as a benchmark for restitution in cash. A party who receives restitution is placed in priority above all other claims against the estate.

. [any other circumstances would allow the filing of a restitution?]

Question 3.3 [maximum 5 marks] [4 marks]

Describe the process of proof of claims for a creditor, under a judicial recovery case, who (i) was not listed in the first list of creditors (presented by the debtor) and (ii) for a creditor who was not listed in the second list of creditors (presented by the judicial administrator).

The process of proving a claim within the context of judicial recovery involves the publication of three basic lists, the purpose of which is to formally notify known creditors not only that a debtor is undergoing a judicial process but to prompt creditors to take requisite steps to prove their debts with the goal that such creditors may, following an adjudication process conducted by the judicial administrator, receive from the judicial recovery process, monies (or a portion of monies) which they have successfully demonstrated are duly owed to them.

The procedure rules for proving a debt in judicial recovery is set out in the Bankruptcy Law and is initiated by the publication of the first list of creditors. That initial list of creditors is drafted by the debtor and sets out enough relevant information concerning each creditor who is owed including the level of debt in respect of each. The means by which the publication is made and the mechanism by which creditors subject to the judicial process must notify the judicial must also conform to the specific rules. For example, claims must contain information such as the identity of the creditor, the amount of the claim, and be supported by documents and any other evidence on which that creditor relies.

Publication of the initial list starts the 15-day time period within which creditors who are subject to the judicial process must submit a proof of their claim in accordance with the procedure set out by the judicial administrator. The judicial administrator will then take a decision in relation to each proof of claim, following which, the administrator publishes a second list of creditors based on information it has gathered from the debtor (including from the debtor’s books and records) and importantly, the proof of claims that have been provided by the creditors. Creditors who have not been listed on the initial list can submit a proof of debt in accordance with the requisite procedure so as to enable the judicial administrator to decide on their claim and also include them on the

second list of creditors. Failure by a creditor to meet the 15-day period will result in that claim being classed as a late claim, the consequence of which is that that creditor will be prevented from having voting rights as well as expose that creditor to litigation costs if the claim is successfully opposed by the debtor.

The second list of creditors is published in the same manner as the first list of creditors but imposes a 10-day time period for creditors to submit their claims. If a creditor is not named on the second list of creditors, that creditor may request to be included in the final list of creditors using the ordinary procedure set out in the Code of Civil Procedure. The reason for proceeding on this basis is that the matter has, by this time, converted from an administrative to a judicial process and therefore, falls within the jurisdiction of the court and is subject to the governing procedural rules. **[who can oppose the request presented by the creditor?]**

QUESTION 4 (fact-based application-type question) [15 marks in total]

Braz Bank is a Brazilian bank. The financial institution has had considerable success lending to distressed debtors. Nonetheless, a series of risks are associated with this activity. Just recently one of its borrowers, Brazil Empreendimentos Ltda (Empreendimentos), has defaulted on a loan.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks] [5 marks]

The loan Empreendimentos has defaulted on was valued at BRL 1,000,000 (one million reais). Due to Empreendimentos' default, an acceleration clause came into effect and caused the entire value of the contract to mature. Given that the loan agreement met all the criteria for making it an extrajudicial executive title under the Civil Procedure Code, Braz Bank's initial step was to protest the contract before a protest officer, making it public that Empreendimentos had defaulted on it. Despite this measure, Empreendimentos did not cure its breach and the loan remains unpaid.

Does Braz Bank have grounds for filing an involuntary bankruptcy proceeding against Empreendimentos? Is there any defence that may be presented by Empreendimentos in order to ensure that the court will not declare its bankruptcy under any circumstances?

Article 94 of the Bankruptcy Law sets out three circumstances under which a creditor may commence an involuntary bankruptcy procedure. The relevant section of the article relevant to Braz Bank states as follows:

The debtor, without a relevant reason under the law, does not pay on the due date a debt that is certain on its value (divida liquida) and expressed in one or more extra-judicially or judicially enforceable titles, duly protested, the sum of which exceeds the equivalent of 40 minimum wages on the date of the petition for bankruptcy.

According to the Bankruptcy Law, Braz Bank have met all aspects of the this criterion since, Empreendimentos is a debtor, whose debt is contained within an agreement which meets the criteria of an extrajudicial executive title under the Civil Procedure Code. The debt has been duly protested with a protest officer and the sum of the debt exceeds the equivalent of 40 minimum wages i.e. BRL8K.

While the facts of this case do not indicate whether Empreendimentos have valid defence against the bankruptcy petition, Article 96 of the Bankruptcy Law provides a number of circumstances by which the involuntary petition might be resisted i.e.

1. Where the title is false (which is unlikely given the type of institution who will be presenting the petition),
2. The statute of limitation applies;
3. The obligation or its title is null;
4. The debt is already been paid (which is not the case)
5. Any other fact that extinguishes or suspends the obligation, or does not legitimise the collection of the claim presented;
6. A defect in the protest or in its instrument;
7. Filing a petition for judicial recovery within 10 days in which the debtor can oppose the request;
8. The debtor has ceased to engage in corporate activities for more than two years.

Any of these defences must be brought within the 10 day time period for doing so. In addition to the above defences, Empreendimentos can also pay a deposit the amounts owing which would avoid the bankruptcy from proceeding.

Question 4.2 [maximum 5 marks] [5 marks]

Suppose, additionally, that the referred loan agreement between Braz Bank and Empreendimentos was also secured by a mortgage over land valued at BRL 350,000 (three hundred-and-fifty thousand reais). Before Braz Bank took any additional measure against Empreendimentos, the debtor voluntarily filed for a judicial recovery proceeding, the processing of which was accepted by the court. The list of creditors presented by the debtor upon filing for judicial recovery showed the following four (4) creditors in Class II (creditors secured by *in rem* guarantees):

- Braz Bank SA: BRL 350,000;
- Banco Enterprises SA: BRL 125,000;
- Brasil Autoparts SA: BRL 100,000;
- Oil Brasil SA: BRL 100,000.

The complete list of creditors (also portraying Classes I, III and IV) has just been published in the official press. A few rumors have come to Braz Bank's attention concerning the fact that Brasil Autoparts SA and Oil Brasil SA are likely to reject the recovery plan that Empreendimentos has been working on. Should the rumors show themselves to be accurate, is Empreendimentos still capable of having its recovery plan approved at a general meeting of creditors? Would there be grounds for a cramdown?

The majority needed by the Class II creditors (i.e. those who have secured claim) to approve the judicial recovery plan is the majority by head count and by the value of the claims of the attending creditors. Empreendimentos would still be capable of having its recovery plan approved at a general meeting of the creditors provided that Braz Bank and Bank Enterprises SA both voted in favour of the judicial recovery plan and that a majority of any other class of creditors also voted in favour of (since, according to Article 56, para 9 of the Bankruptcy Law) all classes must vote in favour of the plan in order for that plan to be approved.

Even if the plan is not approved, the provisions in Article 58 make it possible to still achieve approval of the judicial recovery plan by imposing a lower quorum threshold for approving such plans. If Braz Bank represents over half of the existing credits, it could independently effect a cramdown, without the need to obtain Bank Enterprises SA's vote.

Question 4.3 [maximum 5 marks] [5 marks]

Suppose Braz Bank's loan agreement with Empreendimentos was not secured by a mortgage but rather by a fiduciary title over land valued at BRL 600,000 (six hundred thousand reais). The referred piece of land corresponds to the site where Empreendimentos' main factory is located. Empreendimentos' judicial recovery proceeding has just begun: the Court issued the decision allowing for the processing of the judicial recovery two (2) days ago. How soon can Braz Bank take possession of the land and sell it outside the recovery proceeding? Could Empreendimentos argue anything in defence of maintaining its possession over the land?

The fiduciary title held by Bank Braz has give Bank Braz title to the property and can therefore sell the property without needing to go to court. As the bank retains title, the claim over the asset is immune from any judicial process and is therefore no affected by the fact that judicial recovery for Empreendimentos has commenced. The nature of the title means that, in theory, Bank Braz should be in a position to take take immedicate possession of the land. The reality is that the bank would not likely be able to retake possession of the collateral until another 178 days given the terms of Article 49 of the Bankruptcy Law which stipulates that essential capital goods cannot be removed from the debtor's establishment during that period. There is a good chance that Empreendimentos could successfully argue that the land over which the bank intends to take possession represents an essential part of its business and therefore, defeat the Bank's efforts in taking possession.

*** End of Assessment ***

TOTAL OF 43 OUT OF 50

WELL DONE!